Supreme Court, U.S.
FILED
MAY 29 1992
OFFICE OF THE CLERK

(4)

No. 91-1697

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

FRANCIS EDWIN BASS, *et al.*,
Petitioners,

v.

STATE OF SOUTH CAROLINA, *et al.*

Petition for a Writ of Certiorari to the Supreme Court of South Carolina

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REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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On May 18, 1992, this Court granted certiorari in *Harper v. Virginia Department of Taxation*, No. 91-794. This Court's disposition of *Harper* will control the merits of this case. Thus, the only remaining inquiry here is whether the asserted "independent state law ground" advanced by the court below defeats this Court's jurisdiction to review this case. It does not.

1. The court below held that in pursuing refunds under S.C. Stat. Ann. § 12-47-440 petitioners had utilized the incorrect refund statute and thus were procedurally barred from obtaining any relief. Pet. at 10a. It further held that this putative failure is an "adequate and independent state ground," *id.* at 3a, *citing Michigan v. Long*, 463 U.S. 1032 (1983), and *Harris v. Reed*, 489 U.S. 255

(1989), ostensibly precluding further review of the federal questions presented.

The court below is incorrect in its assertion that petitioner's utilization of the putatively incorrect refund statute is an "adequate" ground for denying relief. Even accepting the court's *current* interpretation of § 12-47-440, petitioners have a right to relief directly under the Fourteenth Amendment. By holding that § 12-47-440 is inapplicable, the court below has effectively shortened the statute of limitations in South Carolina for income tax refunds from three years to thirty days. As this Court has previously held, a state may not, either through its legislature or its courts, strip taxpayers of all existing rights for refund of unlawful taxation. *Brinkerhoff-Faris Trust & Saving Co. v. Hill*, 281 U.S. 673, 682 (1930). *See also Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 111 S. Ct. 2773, 2786-87 (1991) (O'Connor, J., dissenting).

Similarly, irrespective of the scope of South Carolina's refund statute, petitioners have a Fourteenth Amendment right to "a clear and certain remedy" for unconstitutional taxation. *McKesson Corp. v. Florida Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 21 (1990). The "pay under protest" statute to which the court below suggests petitioners were relegated has previously been held not to provide a "plain, speedy and efficient remedy," *United States v. Livingston*, 179 F. Supp. 9 (E.D. S.C. 1959) (Haynsworth, J.), *aff'd*, 364 U.S. 281 (1960); indeed, this was in large measure the impetus for the enactment of what is now § 12-47-440. *See* Brief *Amicus Curiae* of the Tax Section of the South Carolina Bar at 2a (legislative history characterizing the pay under protest procedure as "so fraught with technicality and expense as to be practically unavailable for the vast majority of taxpayers.") The inadequacy of this remedy, coupled with the confusion engendered by the plain language of § 12-47-440, its administrative construction by the South Carolina Tax Commission, and its prior inter-

pretations by the courts of South Carolina,[1] render petitioners' remedy here anything but "clear and certain." This is especially so with respect to 1988 taxes, which were paid after *Davis v. Michigan Department of Treasury*, 489 U.S. 803 (1989), was decided and after the Tax Commission repeatedly advised petitioners to pursue refunds under § 12-47-440. *See* Pet. at 6a; 41a-47a.

2. Not only must an asserted state law ground be "adequate" to preclude review by this Court, so too must it be "bona fide." *Michigan v. Long*, 463 U.S. at 1041. *See also Howlett v. Rose*, 110 S. Ct. 2430, 2437 & n.14 (1990) (review not foreclosed upon assertion of "nonfederal grounds of decision that were without any fair or substantial support," *quoting Ward v. Love County Board of Commissioners*, 253 U.S. 17, 22 (1920)). The court below concluded that § 12-47-440 applied only to "license type fees and taxes." Pet. at 5a. It reached this conclusion in the face of statutory language granting a refund right to "any taxpayer," § 12-47-440,[2] and without explaining why it eschewed its ordinary deference to the construction of the South Carolina Tax Commission.

Moreover, while the court suggests that its ruling is firmly anchored in precedent, Pet. at 4a ("This Court has previously stated that 'the exclusive remedy for contest-

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[1] Petitioners mistakenly refer in their petition to the decision of *Slater Corp v. South Carolina Tax Comm'n*, 314 S.E.2d 31 (S.C. App. 1984) as a decision of the Supreme Court of South Carolina. *See* Pet. at 10-11 n.4 and 12. That decision is of the intermediate court of appeals, not the Supreme Court.

[2] Moreover, the enabling clause of the original enactment of § 12-47-440 provided that "[t]his act shall . . . apply to taxes or license fees paid or assessed after December 31, 1959." Brief *Amicus Curiae* of the Tax Section of the South Carolina Bar at 6a. Thus, the statutory language grants a refund right to "any taxpayer" for any illegal "taxes or license fees." This statutory language is utterly irreconcilable with the parsimonious construction of § 12-47-440 adopted by the court below.

ing . . . *income taxes* [is] by payment under protest' ", *citing Perpetual Building & Loan Assoc. v. South Carolina Tax Comm'n*, 180 S.E.2d 195, 197 (S.C. 1971) (emphasis original)), in fact this putative precedent is merely creative parsing of dicta from a case citing the availability of § 12-47-440 in income tax cases. That is, the complete sentence to which the court only partially cites states:

> In *Elmwood Cemetery Assoc. v. Wasson*, 169 S.E.2d 148 (S.C. 1969), *we there denied* the declaratory relief sought, holding that the exclusive remedy for contesting an alleged erroneous assessment of income taxes was by payment under protest of the tax claimed as illegal and a suit at law for recovery of the sum so paid, in accordance with Sections 65-2661 and 65-2662 of the Code.

Perpetual Building & Loan Assoc., 180 S.E.2d at 197 (emphasis added). Discussing the pay under protest provisions in *Elmwood*, the court held:

> This chapter authorizes the payment of taxes claimed to be illegal under protest and suit at law for the recovery of the sum so paid. Sections 65-2661 and 2662, *ibid. With the exception of certain remedies before the Commission, which are in nowise involved*, the Code is explicit that the remedy provided by these sections is exclusive.

169 S.E.2d 148 (emphasis added.) Thus, *Elmwood* holds that refunds are available under the pay under protest provisions *or* under administrative procedures (now § 12-47-440). Because *Perpetual Building & Loan Assoc.* is explicitly predicated on *Elmwood*, its citation to support the exclusivity of the pay under protest provisions is wholly inapt.

For these reasons, the lower court's reliance on *Perpetual Building & Loan Assoc.* is inappropriate and its holding that South Carolina's pay under protest provisions are the exclusive means for seeking refund of income taxes is "without any fair or substantial support." *Ward*

v. Love County, 253 U.S. at 22. The State's wishes to the contrary notwithstanding, its assertion of this putative "state law ground" neither precludes review of the substantial federal questions presented here nor relieves it of its obligations to provide petitioners "meaningful backward-looking relief." *McKesson*, 496 U.S. at 31.

CONCLUSION

For the foregoing reasons, and for those reasons stated in the Petition, the Petition for a Writ of Certiorari to the Supreme Court of South Carolina should be granted.

Respectfully submitted,

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